Supreme Court, U.S.
FILED
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CASE NO: 93-1031

IN THE SUPREME COURT

OF THE UNITED STATES OF AMERICA

OCTOBER 1993

ROSCOE COON and ARNAUD GIRARD D'ALBISSIN,

PETITIONERS,

VS.

SHUTTS & BOWEN,

RESPONDANTS.

PETITION FOR WRIT OF CERTIORARI TO THE

U. S. COURT OF APPEALS FOR THE 11th CIRCUIT

PETITION FOR WRIT OF CERTIORARI

(PRO SE)

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER A DISTRICT JUDGE WHO AWARDS PART OF TAXABLE COSTS AGAINST AN ATTORNEY UNDER 28 U.S.C. §1927 FOR "UNREASONABLY AND VEXATIOUSLY MULTIPLYING THE PROCEEDINGS" HAD TO MAKE AN EXPRESS FINDING OF BAD FAITH?

II. When using the word "bad faith" in enforcing §1927, different circuits give it a different meaning: in the 2nd, 5th, 6th, 7th, and 10th circuits "bad faith" means objective bad faith; however, in the case at bar, the 11th circuit required subjective bad faith, to be evidenced by an intent to "willfully abuse the judicial process".

IF A FINDING OF BAD FAITH IS AT ALL NECESSARY IN AN AWARD OF SANCTIONS UNDER 28 U.S.C. §1927, IS THE STANDARD OBJECTIVE BAD FAITH OR SUBJECTIVE BAD FAITH?

CERTIFICATE OF INTERESTED PERSONS

1) ROSCOE COON,
d/b/a Marine Diesel Repair
Key West, Florida

2) THOMAS K. COSSELMON,
Florida

3) THE ESTATE OF WILLIAM COSSELMON,
Key West, Florida

4) JUDGE COX,
United States Court of Appeals,
11th Circuit

5) ARNAUD GIRARD D'ALBISSIN,
Key West, Florida

6) TRUMAN M. HOBBS, SENIOR JUDGE,
United States District Court
Middle District of Alabama

7) JAMES LAWRENCE KING, CHIEF JUDGE,
United States District Court,
Southern District of Florida

8) JUDGE KRAVITCH,
United States Court of Appeals,
11th Circuit

9) SHUTTS & BOWEN,
Law Firm,
Miami, Florida

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

1) ORDER VACATING DISTRICT COURT'S ORDERS

Judges KRAVITCH & COX, 11th Circuit Court of Appeals and Judge HOBBS, Senior District Judge, Middle District of Alabama

8-26-93 APPENDIX - EXHIBIT A

2) FINAL ORDER OF DISMISSAL

Judge KING, U.S.D.C. So. Dist. of Florida

8-23-91 APPENDIX - EXHIBIT B

3) ORDER OF CLARIFICATION

Judge KING, U.S.D.C. So. Dist. of Florida

10-30-91 APPENDIX - EXHIBIT C

STATEMENT OF JURISDICTION

This court has jurisdiction to grant a Writ of Certiorari pursuant to Supreme Court Rules, Rule 10(1)(a).

This petition for Writ of Certiori has been timely submitted, having been filed in less than 90 days from the August 26, 1993 filing of the 11th Circuit Court of Appeals Order vacating two previous orders taken by the United States District Court, Southern District of Florida.

TABLE OF CITATIONS

CODE CITATIONS

1) **28 U.S.C. §1927**

"Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney fees reasonably incurred because of such conduct."

STATEMENT OF THE CASE

This is an Admiralty case brought *in rem* against the boat "COCO LOCO" for tort.

Roscoe Coon was appointed substitute custodian for the vessel at a rate of $100 per day.

Three months after the seizure, the Plaintiff died. The custodian fees had reached about $9,000 and had not been paid. The major issue at that time was the computation of a bond based on the value of the vessel. Both sides were arguing that the value of the boat was between $1,000 and $8,000.

However, after the death of their client, plaintiff's attorneys did nothing to abate the disproportion between costs of custodianship and possible relief that could be expected due to the relatively low value of the vessel. On the contrary, they moved twice to continue the action under Rule 25 of the Federal Rules of Civil Procedure, "pending revival". Nobody

ever revived the action and unpaid custodial fees ultimately reached $23,000.

Defendant d'Albissin and the Custodian filed seperate pleadings accusing plaintiff's attorneys of malpractice and unreasonable multiplication of proceedings. Compelled by the district judge to respond to different motions and to a counterclaim joining them as indispensable parties, the Law Firm rather chose to move for voluntary dismissal of the action. The district judge conditioned the voluntary dismissal upon the advance payment of custodial costs by the law firm to be later resolved between the law firm and their client. The attorneys appealed.

The district court entered an order releasing the boat and clarifying the dismissal and finally sanctioned the plaintiff's attorneys under 28 U.S.C. §1927 for not having dismissed the case upon the death of their client where it was obvious that the action had already cost as much as it could bring in.

On appeal to the 11th Circuit Court of Appeals, the orders were vacated. The Appeals Court reasoned that in 28 U.S.C. §1927 the 11th Circuit required a finding that the "attorney willfully abused judicial process" contrary to the jurisprudence of the 2nd, 5th, 6th, 7th, and 10th circuits allowing sanctions against an attorney who unreasonably and vexatiously multiplies the proceedings despite the absence of any conscious impropriety.

ARGUMENT SEEKING WRIT OF CERTIORARI UNDER SUPREME COURT RULE 10 (1) (a)

In Roadway Express V. Piper, 100 S. Ct. 2455, 1980, the Supreme Court clarified the respective standards to be used in the "inherent power of the court" and in Title 28 §1927 of the United States Code.

Section 1927 was since amended by the Congress and has found wide-spread use in the different circuits in the country.

The Supreme Court has not since returned to this section and the case at bar illustrates the lack of uniformity in the jurisprudence of this matter.

A) In most circuits a finding of objective bad faith is sufficient to an award of sanctions under 28 U.S.C. §1927.

"Proper standard under either Fed Rule of Appellate Procedure 38 or statute providing for sanctions against attorney who multiplies

proceedings is that excess costs, expenses or attorney fees are imposable against attorney personally for conduct viewed objectively, manifests either intentional or reckless disregard for attorney's duties to court, subjective bad faith is not necessary."

- Braley V. Campbell CA 10th Cir 832 F2d 1504

"An objective standard of bad faith is sufficient to warrant imposition of sanctions under statute governing liability of counsel for excessive costs."

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"A close reading of this statute reveals that the rule envisions a sanction against an attorney only when that attorney both (1) multiplies the proceedings, and (2) does so in a vexatious and unreasonable fashion."

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"Personal responsibility should flow only from an attorney's intentional departure from proper conduct or at a minimum, from a reckless disregard of the duty owed by counsel to the court."

- U.S. V. Ross 535 F2d 1346 (1976) 6th Circuit

"For purpose of applying statute governing counsel's liability for excessive costs, a court need not rely solely on direct evidence of attorney's subjective knowledge in determining whether attorney acted intentionally, court may infer intent from total lack of factual or legal basis for a suit, and may look to extrinsic or circumstantial evidence. 28 USCA §1927"

- Knorr Brake Corp. V. Harbil
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"We hold that 28 U.S.C. §1927 authorizes a court to assess fees against an attorney for 'unreasonable and vexatious' multiplication of litigation despite the absence of any conscious impropriety."

- Jones V. Continental Co.

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"... the bad faith requirement is limited to the court's inherent powers, and that the 'unreasonable and vexatious multiplication' requirement of the amended statute is a different and lower standard."

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"Like an award made pursuant to the court's inherent power, an award under §1927 is proper when the attorney's actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay."

- Oliveri V. Thompson

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Quoting the 6th Circuit in Jones V. Continental Co. (Supra), the District Court applied the "unreasonable and vexatious multiplication" requirement finding:

- that the fact that there were unrebutted evidences that the seized vessel was not worth more that $9,000.

- that after the plaintiff's death, the custodial fees for the vessel were already approximately $9,000 and were unpaid.

- that therefore the record logically implied that it was a wanton and reckless multiplication of proceedings to move twice to continue the action under Rule 25 FRCP adding another $12,000 to the costs of an action that had already cost more than it could bring in and that therefore, of course, nobody would revive.

The district court found that these deductions alone brought the sanctions within the meaning of §1927 "despite the absence of any conscious impropriety."[1]

B) The 11th Circuit Court of Appeals departed from that jurisprudence.

In its opinion, the Court of Appeals, after acknowledging the jurisprudence from the 6th Circuit, wrote: "Our cases, however, have held that this statute allows a court to assess excess costs against attorneys "who willfully abuse judicial process by conduct tantamount to bad faith."[2] This sentence is a little bit ambiguous; however, it is clear

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[1] See this document - page 50

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that the standard the court proposes to apply is not:

(1) willful abuse **or** conduct tantamount to bad faith,

but (2) willful abuse **and** conduct tantamount to bad faith; thereby imposing a more stringent standard of willful, permissive intent to abuse which is subjective bad faith and an incorrect interpretation of §1927 which reads only "unreasonable and vexatious multiplication."

Applying its reasoning to the record, the Appeal court finds:

> "The district court notes that 'it is questionable whether this in rem action should ever have been brought. There is no question that the case should have been dismissed long ago' we cannot disagree with this conclusion."[3]

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[3] See this document - page 35

There, under the "unreasonable and vexatious multiplication" requirement the concurring opinions that "the case should have been dismissed long ago" should have allowed the district court's order to stand. The obvious unreasonableness of those costs, totally disproportionate, and unrecoverable would have been sufficient to support an award of sanctions "despite absence of any conscious impropriety."[4]

However, the Appeals Court finds this equation between costs, benefits and hardship to innocent parties insufficient evidence to support an award of sanctions "in the absence of bad faith intent to delay this action".[5]

The court of appeals concludes: "the district court didn't find that Shutts & Bowen acted in bad faith".[6]

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[4] Jones v. Continental (supra); this document - page 50

[5] See this document - page 34

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Indeed, the district court, in its Order of Clarification found only "that the firm of Shutts & Bowen unreasonably and vexatiously multiplied the proceedings here within the meaning of 28 U.S.C. §1927."[7]

As viewed by the Ct. of Appls., the fact that the Law Firm used Rule 25 of FRCP within the scope of its application serves to shield the firm from liability for costs "absent any willful intent to delay the action."[8] The Dist. Ct. views, in following with most jurisprudence, that it is the fact that it was objectively unreasonable to use Rule 25 under those circumstnaces that brings the firm within the reach of sanctions under §1927 even in the "absence of any conscious impropriety."[9]

Petitioners pray this court will turn to the application of §1927 since amended and clarify the standards it requires.

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7 See this document - page 54
8 See this document - page 34
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CONCLUSION

Justice was not served in this case by the vacation of the district court's award of sanctions. It is only too obvious that the reckless conduct of Plaintiff's attorneys created an unreasonable hardship on all parties to this action.

As officers of the court, it was the attorneys' duty to see that their action would stick to the basic meaning of "seeking relief" and not become a legal labyrinth where exasperated judges and litigants try to reconcile outrageous and disproportionate expenses, unpaid court appointed servants, dispossessed defendants and sucked-dry estates.

All over the country, attorneys have been defending themselves with a lot of skill, convincing the courts that bad faith, at first "objective" and now "subjective", was an absolute requirement to sanction them under §1927; little by little undermining the very

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But in fact, the Congress didn't even include "bad faith" in the language of §1927, whether "objective" or "subjective". The attorney is liable every time he is found guilty of unreasonably and vexatiously multiplying the proceedings.

It is time to give back to section 1927 the meaning and the impact the Congress wanted it to have, which was to deter and sanction the multiplication of meritless cases and reckless prosecutions.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

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Nos. 91-5921 & 91-6000

D. C. Docket No. 91-10010-CIV-JLK

WILLIAM COSSELMON,

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ARNAUD D'ALBISSIN,

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Appeals from the United States District Court
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Before KRAVITCH and COX, Circuit Judges, and HOBBS*, Senior District Judge.

PER CURIAM:

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*Honorable Truman M. Hobbs, Senior U.S. District Judge for the Middle District of Alabama, sitting by designatic

EXHIBIT A

On January 31, 1991, William Cosselmon brought this admiralty in rem action against the COCO LOCO, a boat owned by Arnaud d'Albissin. The United States Marshal arrested the vessel and, at the plaintiff's request, the district court appointed a substitute custodian to be paid at the rate of $100 per day. Cosselmon died in an automobile accident just three months later, while this case was still pending in district court. The district court dismissed the case on August 23, 1991, imposing liability for the substitute custodian's fees on the deceased Cosselmon and his attorneys, Shutts & Bowen. Shutts & Bowen appealed that order and the court's denial of partial relief from the judgement on October 16, 1991. The court clarified its earlier order of dismissal and ordered the return of the vessel to d'Albissin on October 30, while the earlier orders were on appeal to this court.

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Defendant-Appellee,

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Substitute Custodian-Appellee.

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The firm of Shutts & Bowen appeals the district court's order imposing the substitute custodian's fees upon the attorneys. Finding the record insufficient to support the district court's order that Shutts & Bowen pay the substitute custodian's fees as a sanction for unreasonably and vexatiously prolonging the proceedings, we vacate the judgement of the the district court.

I. FACTS & PROCEDURAL HISTORY

The following facts and procedural history are not in dispute. The plaintiff, William Cosselmon, owned a boat, the WINDOVER, which was allegedly damaged by fire that began aboard another vessel, the COCO LOCO. Seeking payment for the damage to the WINDOVER, Cosselmon filed a complaint against the COCO LOCO in rem and sought the arrest of the boat by the Marshal. On the same day, Cosselmon moved for appointment of Roscoe Coon, who was doing business as Marine Diesel Service

(MDS), as substitute custodian of the vessel. The motion stated that MDS would act as custodian for compensation of $100 per day. Cosselmon posted with the court a cost bond of $500 to cover any costs of the action.

The Marshal arrested the vessel on February 4, 1991. Subsequently, Arnaud d'Albissin filed a claim to the vessel stating that he is its sole owner.[1] Proceeding without an attorney, on February 27, d'Albissin made several motions including one to increase security to $8,000. He then filed an Answer to the complaint.

On March 18, Cosselmon, through his attorneys, Shutts & Bowen, opposed each of d'Albissin's motions. The motion most relevant to the issue on appeal is d'Albissin's motion to increase security. Cosselmon opposed the motion to raise the cost

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[1] d'Albissin was not the owner of the COCO LOCO at the time of the fire. He purchased the boat in its badly burned condition.

bond in part because d'Albissin had not offered evidence that the boat was worth $8,000. On April 11, the district court referred the matter to a magistrate judge. The magistrate judge set the motions for hearing on May 16.

On April 28, Cosselmon died. On May 7, d'Albissin filed a suggestion of death in which he explained that Cosselmon's attorney had informed him during a phone conversation on May 2 of the plaintiff's death.

On May 13, Shutts & Bowen moved to continue the hearing on d'Albissin's motions until they could substitute the successor in interest for the deceased plaintiff. The court granted a continuance until June 27. Meanwhile, the substitute custodian's fees were mounting.

On June 4, d'Albissin submitted as exhibits to a motion for dismissal photos of the seriously burned COCO LOCO. He also submitted a canceled check for $8,000, which

he said he used to purchase engines, generators, and the like that were stored upon the COCO LOCO. This check indicated that his total investment in the boat was $9,000.

On June 25, Shutts & Bowen filed another motion for continuance because they had not made a substitution for the plaintiff and because the attorneys believed the substituted party should have the right to depose d'Albissin, who had not attended a deposition for which he had been scheduled. The district court denied the motion to continue.

On July 1, the magistrate denied three of d'Albissin's four motions. Deferring consideration of d'Albissin's motion to increase security to $8,000, the magistrate ordered (1) the plaintiff to "file an affidavit delineating the insured status of the vessel," (2) the claimant to provide the plaintiff with copies of unspecified exhibits and (3) the plaintiff to review the exhibits and "file a motion delineating the status of

the bond issued as security for the vessel." [R.1-39.].

On July 4, d'Albissin filed motions for leave to add a counterclaim to his answer, for a jury trial on that counterclaim and to add Shutts & Bowen and Michael Berger (the lawyer from Shutts & Bowen most directly involved in the case) as indispensable parties. [R.1-44, R.1-45, R.1-46] Shutts & Bowen moved for a voluntary dismissal on July 9, seeking return of the COCO LOCO to d'Albissin. [R.1-47] On July 15, the district court ordered Shutts & Bowen to respond to d'Albissin's motions for leave to add a counterclaim and to add the lawyers as indispensable parties. [R.1-48] Shutts & Bowen filed a response on July 19, in which they again requested the return of the COCO LOCO to d'Albissin. [R.1-53]

In the meantime, counsel for MDS, the substitute custodian, moved the court to order the plaintiff and the plaintiff's attorneys to pay the fees currently owed for MDS's

services. On July 25, the district court granted a voluntary dismissal, conditioned upon the payment by the plaintiff of the fees of the substitute custodian. [R.1-55] The court subjected the return of the vessel to d'Albissin to that same condition.

The plaintiff's estate did not pay the fees of the substitute custodian. On August 16, Shutts & Bowen moved to withdraw as counsel and again requested return of the COCO LOCO to its owner. [R1-60] On that same day, the court ordered the plaintiff and Shutts & Bowen to show cause by August 30 why the plaintiff and his attorneys should not have to pay the substitute custodian's fees. On August 23, seven days before the due date of Shutts & Bowen's response, the court ordered the final dismissal of the action. In that order, the court ordered the plaintiff to pay MDS, at the agreed rate of $100 per day, within seven days of the order. In the event that the plaintiff did not pay the fees within

seven days, the court ordered Shutts & Bowen to pay the fees "as a cost of litigation to be reimbursed by the plaintiff . . . or to be otherwise resolved between the plaintiff and plaintiff's counsel." [R1-62 at 2.]. The court offered only the following explanation for imposing the fees on the plaintiff's attorneys:

> The plaintiff had previously agreed to pay the fees of the substitute custodian, and plaintiff's counsel had represented that such fees would be paid. The plaintiff's claims have been abandoned, the vessel remains in the custody of the substitute custodian, and the custodial fees have not been paid. Plaintiff's counsel had filed the motion for the appointment of a substitute custodian, which asserted that the plaintiff would indemnify the Unted States and the United States Marshal for any liability that might be incurred in connection with the

care and custody of the arrested vessel. [R.1-62 at 1.].

Shutts & Bowen moved the court for partial relief from this order, contending that the court had not stated a legal basis for imposing costs on the attorneys. Shutts & Bowen attempted to demonstrate that the firm could not be liable under either contract or agency principles and that MDS was guilty of laches in pursuing its claim for custodial fees. The firm also requested a hearing on the matters contained in its motion and sought the immediate return of the COCO LOCO to d'Albissin. The court denied Shutts & Bowen's motion for partial relief from the order on September 23. [R.1-67] Shutts & Bowen filed a timely notice of appeal of the August 23 order and the September 23 order denying relief from the judgement. [R.2-69]

Subsequently, MDS obtained a writ of execution against Shutts & Bowen. Shutts & Bowen moved for an emergency stay, which the

court granted until October 22. [R.2-74] Shutts & Bowen also moved to set a supersedeas bond to stay execution of the judgement pending appeal. [R.2-70,71] The district court held a hearing on these matters on October 25. The transcript of the hearing reveals that the court heard argument and testimony not only about the amount of supersedeas bond and the granting a stay of execution pending appeal, but also about the propriety of the imposition of the custodial fees on Shutts & Bowen. This latter matter was the issue on appeal to this court.

After "reconsideration of the record and hearing arguments of the parties" the court issued an order granting a stay pending appeal, setting a supersedeas bond of $100 and clarifying its earlier rulings. [R.2-75 at 4.]. In particular, the court ordered that Shutts & Bowen pay the substitute custodian's fees accruing from April 29 to August 23, as a sanction under 28 U.S.C. §1927. (Id. at 9-10).

Shutts & Bowen filed a timely notice of appeal from this order. [R.2-78] This court consolidated the two appeals.

II. ISSUE ON APPEAL

The parties state numerous issues in their briefs. All are components of the single issue we decide: whether the district court properly imposed liability for the substitute custodian's fees upon Shutts & Bowen, the attorneys for William Cosselmon, the deceased plaintiff.

III. DISCUSSION

A. District Court Had Jurisdiction To Enter Clarifying Order

The first step in our analysis is to determine whether the district court had jurisdiction to enter the Order of Clarification of its orders imposing custodial fees upon Shutts & Bowen after Shutts & Bowen filed a notice of appeal. The general rule is

that the filing of a notice of appeal removes jurisdiction over matters involved in the appeal from the district court and places jurisdiction in the appellate court. Showtime v. Covered Bridge Condominium Ass'n, 895 F.2d 711, 713 (1990). This rule, however, has several exceptions. The district court continues to have jurisdiction if the notice of appeal concerns a non-appealable order. United States v. Hitchmon, 602 F.2d 689, 694 (5th Cir. 1979).[2] When a party has filed a notice of appeal of an appealable order, the district court retains the power "to act in aid of the appeal, to correct clerical mistakes or to aid in the execution of a judgement that has not been superseded." Showtime, 895 F2.d at 713.

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[2] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

The propriety of the requirement that Shutts & Bowen pay the fees of the substitute custodian is clearly a matter involved in the appeal. The district court, however, had jurisdiction to clarify its earlier order to the extent that it acted in aid of the appeal. Silverthorne v. Laird, 460 F.2d 1175, 1178-79 (5th Cir. 1972)

The former Fifth Circuit decided in Silverthorne that even after a notice of appeal has been filed, a court may issue an explanatory order, which offers supporting reasons for the order appealed from. This type of opinion, it was stated, can aid the reviewing court in understanding the action taken by the lower court. Id. at 1178. We conclude that the district court retained jurisdiction for the limited purpose of explaining the reasons for imposing the fees against Shutts & Bowen.

The district court heard argument and testimony at the hearing on supersedeas bond

and stay of execution, some of which appears to go beyond the appropriateness of a stay or the amount of bond necessary to secure payment of the judgement in the event of an affirmance. To explain Shutts & Bowen's liability for the substitute custodian's fees, however, the court apparently relied solely upon arguments and evidence already in the record. The court does not mention in the relevant portion of its clarification order any of the testimony offered at the hearing.[3]

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[3] The order did, however, purport to effect one change relevant to the matter on appeal. The court held Shutts & Bowen liable for substitute custodian's fees only for the time between the death of the plaintiff and the final dismissal of the action on August 23, $100 per day for 117 days. The earlier order apparently required Shutts & Bowen to pay the total amount of fees owed, which was $100 per day for 245 days, as stated in the writ of execution obtained by MDS. This reduction appears to go beyond mere clarification to constitute an alteration of its earlier order. Because we find that the sanction imposed against Shutts & Bowen was unjustified in any amount, we need not address the implications of the court's apparent post-notice-of-appeal attempt to diminish the earlier judgement against Shutts & Bowen.

B. District Court Erred in Imposing Sanctions Against Shutts & Bowen

The court erred in imposing custodial fees upon Shutts & Bowen as a sanction under 28 U.S.C. §1927. Section 1927 provides:

> Counsel's liability for excessive costs
>
> Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

28 U.S.C.A. §1927 (West Supp. 1993).

We review a court's imposition of sanctions under 28 U.S.C. §1927 for abuse of discretion. Malautea v. Suzuki Motor Co., Ltd., 987 F.2d 1536,1545 (finding the court's imposition of sanctions to be well within its discretion); In re Hunt, 754 F.2d 1290 (5th

Cir. 1985). We review the district court's factual findings for clear error. Malautea, 987 F.2d at 1544 (finding no clear error in district court's finding of bad faith).

The district court cited the Sixth Circuit case Jones v. Continental Corp., 789 F.2d 1225 (6th Cir. 1986), for the court's conclusion that §1927 does not make subjective bad faith on the part of the attorney a prerequisite to liability for excess costs. Our cases, however, have held that this statute allows a court to assess excess costs against attorneys "who willfully abuse judicial process by conduct tantamount to bad faith." Avirgan v. Hull, 932 F.2d 1572, 1582 (discussing district court's imposition of opposing party's attorney's fees under §1927 against attorneys); Malautea, 987 F.2d at 1544 (citing Avirgan).

This case presents an unfortunate situation; persons who were not involved in the conflict that led to the litigation have

suffered great expense on account of the litigation. This record is insufficient, however, to support the imposistion of the substitute custodian's fees upon the law firm of Shutts & Bowen.[4] The district court did not find that Shutts & Bowen acted in bad faith, and we find no evidence of bad faith.

The firm was faced with the death of the plaintiff, William Cosselmon. Without authority from the successor in interest to Cosselmon's boat, the WINDOVER, it may have been unwise to dismiss the action. The successor might have chosen to continue the litigation, as Federal Rule of Civil Procedure 25(a)(1) clearly contemplates. Rule 25(a)(1) requires the court to dismiss the action if a substitution of parties is not made within ninety days after the death is suggested in

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[4] We, therefore, need not address Shutts & Bowen's argument that the court failed to give the firm appropriate notice and an opportunity to be heard before imposing sanctions under §1927.

the record.[5] On the record, that time limit did not expire until, August 5, 1991, ninety days from May 7. On July 9, after Tom Cosselmon, the successor in interest, notified the firm that he did not wish to continue the action, Shutts & Bowen filed a motion for voluntary dismissal. There is no evidence Shutts & Bowen unreasonably and vexatiously delayed the filing of a motion for voluntary dismissal until that time or that the firm unreasonably and vexatiously multiplied the proceedings thereafter.

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[5] Fed. R. Civ. P. 25(a)(1) reads as follows:

> If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party. [emphasis added].

The district court focuses on Shutts & Bowen's knowledge of the rising substitute custodian's fees and the deteriorated state of the COCO LOCO as a basis for imposing those fees upon the firm for failing to seek a voluntary dismissal of the action sooner than July 9. Mere awareness of such factors, however, in the absence of bad faith intent to delay this action, is simply not enough to warrant the imposition of sanctions. The record shows that Shutts & Bowen opposed d'Albissin's motion to increase security for the boat based on d'Albissin's failure to submit evidence that the value of his interest in the boat was $8,000. This allegation was true; d'Albissin did not introduce such evidence until June 4, when he attached certain relevant exhibits to a motion to dismiss.

The canceled checks and pictures indicate both that d'Albissin's investment in the COCO LOCO was approximately $9,000 and that the

vessel had been badly damaged by fire. Thus, foreclosure of the lien on the boat might not support the rapidly rising substitute custodian's fees. From this evidence, the district court notes that "it is questionable whether this in rem action should ever have been brought. There is no question that the case should have been dismissed long ago." We cannot disagree with this conclusion, but we find no evidence that Shutts & Bowen recklessly or deliberately delayed the dismissal of the action.

The firm was acting on behalf of its client, who died during the pendency of the litigation. The successor in interest might very well have decided to pursue the action, and Rule 25(a) apparently established the time limit for making such a decision at ninety days from the filing of a statement of the fact of death. Shutts & Bowen's delay of sixty-three days in filing a motion for voluntary diismissal, even in the face of

mounting substitute custodian's fees, cannot on this record be grounds for imposing those fees on Shutts & Bowen as a sanction under §1927. The district court, therefore, abused its discretion in imposing those fees upon Shutts & Bowen.

IV. CONCLUSION

The district court erred in imposing liability for the substitute custodian's fees upon the plaintiff's law firm, Shutts & Bowen, as a sanction under 28 U.S.C. §1927. We, therefore, VACATE the district court's orders imposing those fees against Shutts & Bowen.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-10010-CIV-KING

WILLIAM COSSELMON,

Plaintiff,

v.

"COCO LOCO", HER ENGINES,
BOILERS, ETC., ANNE BELTRAN,
JEAN-CLAUDE VANRYTIENANT,
and ARNAUD GIRARD d'ALBISSIN,

Defendants.

_____/

FINAL ORDER OF DISMISSAL

This cause comes before the court on a variety of motions filed by the parties to this case. Previously, this court granted the platintiff's motion for voluntary dismissal and for an order allowing the return of the vessel "Coco Loco" to the claimant. However, the court conditioned the voluntary dismissal upon the payment by the plaintiff of the custodial fees of the substitute custodian.

EXHIBIT B

The plaintiff had previously agreed to pay the fees of the substitute custodian, and plaintiff's counsel had represented that such fees would be paid. The plaintiff's claims have been abandoned, the vessel remains in the custody of the substitute custodian, and the custodial fees have not been paid. Plaintiff's counsel had filed the motion for the appointment of a substitute custodian, which asserted that the plaintiff would indemnify the United States and the United States Marshal for any liability that might be incurred in connection with the care and custody of the arrested vessel.

Accordingly, after careful consideration of this matter and the court being otherwise fully apprised, it is

ORDERED and ADJUDGED that the above-styled action be, and the same hereby is, DISMISSED. It is further

ORDERED and ADJUDGED that the plaintiff must pay the fees owed to the substitute

custodian, Marine Diesel Repair, at the agreed rate of $100 per day. Moreover, to the extent that the plaintiff does not pay such fees within seven (7) days of this order, it is further

ORDERED and ADJUDGED that plaintiff's counsel shall pay such fees forthwith as a cost of litigation or to be reimbursed by the plaintiff as a cost of litigation or to be otherwise resolved between the plaintiff and plaintiff's counsel. It is further

ORDERED and ADJUDGED that the vessel "Coco Loco" is to be returned to the defendant/claimant, Arnaud Girard d'Albissin, immediately after the plaintiff has paid the custodial fees. It is further

ORDERED and ADJUDGED that all other pending motions are hereby DENIED.

DONE and ORDERED in chambers at the United States District Courthouse, Federal Courthouse Square, Miami, Florida, this 23rd day of August, 1991.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-10010-CIV-KING

WILLIAM COSSELMON,

Plaintiff,

V.

"COCO LOCO", HER ENGINES,
BOILERS, ETC. ANNE BELTRAN,
JEAN-CLAUDE VANRYTIENANT,
and ARNAUD GIRARD d'ALBISSIN,

Defendants.

_____/

ORDER ON SUPERSEDEAS BOND AND
ORDER OF CLARIFICATION

THIS CAUSE is before the Court on Shutts & Bowen's Application for Stay of Execution and Motion for Approval of Supersedeas Bond. A hearing was held on the matter on October 25, 1991. In light of facts developed at that hearing, the Court has reconsidered its earlier rulings and will clarify its Final

EXHIBIT C

Order of Dismissal of August 23, 1991. Accordingly, the Court has determined that a bond in the amount of $100.00 is necessary to protect the rights and interests of the parties until the cause is ultimately resolved.

I. BACKROUND AND PROCEDURAL HISTORY

The Coco Loco, and 85-foot vessel rescued by the Coast Guard in October, 1990 and taken to Key West Seaport, caught fire on or about December 27, 1990. Anne Beltran and Jean-Claude Vanrytienant owned the vessel at the time of the fire. The Verified Complaint alleges that the fire spread from the Coco Loco to Plaintiff's boat, the Windover, causing approximately $26,000.00 in damages to that vessel. On January 2, 1991, the burned-out hull of the Coco Loco was sold by the original owners to Claimant Arnaud Girard d'Albissin, for the sum of $1,000. Claimant paid an additional $8,000 for salvageable equipment and gear on the Coco Loco. On

January 8, 1991, after Claimant had purchased the vessel, plaintiff filed a Claim of Lien against the Coco Loco in state court. On January 31, 1991, Plaintiff, represented by the law firm of Shutts & Bowen, initiated the instant in rem admiralty action to foreclose the maritime lien. The next day, Marine Diesel Repair, a firm in Key West operated by Mr. Roscoe Coon, was appointed Substitute Custodian by Judge Hoeveler, at a rate of $100.00 per day. Aff. of Sub. Cust. at 1-2. By affidavit signed on February 1, 1991, Mr. Coon agreed to "store" the vessel, and provide services including "insurance, boat inspection and pumping bilges, security & power." Id. at 1.

Claimant d'Albissin, proceeding pro se, foresaw the shallow reef upon which this litigation ultimately foundered: Plaintiff had placed all parties to this litigation at risk by posting a cost bond that was insufficient to cover even one week of custodial fees. On September 27, 1991, d'Albissin moved

for a change in appointment of substitute custodian, and further moved to "increase the security for cost and for surety." D.E. 11. Claimant sought a bond of $8,000.00 "to pay all costs and expenses that shall be awarded against the Plaintiff should a judgment be served in the Defendant's favor." Plaintiff opposed the motion, stating that Claimant "demonstrated absolutely no need for protection" in that amount because Claimant had only paid $1,000.00 for the vessel. D.E. 19. By Order dated April 5, 1991, the matter was referred to Magistrate Judge Peter Palermo.

On or about April 28, 1991, Plaintiff William Cosselmon died in an automobile accident in South America. Claimant d'Albissin filed a "Notice of Statement of Fact of Death" pursuant to Fed R. Civ. P. 25 (a) on May 7, 1991. D.E. 28.

By Order dated July 1, 1991, Judge Palermo granted Claimant's motion to increase

security. After hearing oral argument, it was ordered, inter alia, that "Plaintiff shall, after reviewing the appropriate exhibits, file a motion delineating the status of the bond issued as security for the vessel, twenty (20) days from the date of this order." On July 9, 1991, Shutts & Bowen moved for a voluntary dismissal. D.E. 47. The firm represented that PLaintiff's father and "successor in interest," Tom Cosselmon, decided that he did not wish to be substituted as plaintiff, because he "did not have the requisite funds to further prosecute this action nor does he have the funds to provide additional security for the vessel as requested in the claimant's Motion to Increase the Security for Costs and Surety." Id. at ¶5. By Order dated July 24, 1991, this Court granted Plaintiff's motion, but specifically conditioned dismissal on plaintiff's payment of the costs of this action.

The substitute custodian, through counsel,

moved for payment of custodian fees on July 17, 1991. Substitute custodian renewed this motion on August 8. On August 16, this Court directed Plaintiff and Plaintiff's counsel to show cause why the relief requested by the substitute custodian should not be granted. This Court then entered a Final Order of Dismissal dated August 23, 1991, ordering that "plaintiff must pay the fees owed to the substitute custodian, Marine Diesel Repair, at the agreed rate of $100.00 per day." The Final Order also mandated that if plaintiff failed to pay such fees within seven (7) days, "plaintiff's counsel shall pay such fees forthwith as a cost of litigation or to be otherwise resolved between plaintiff and plaintiff's counsel." Shutts & Bowen's Motion for Partial Relief was denied by Order dated September 23. On October 9, the substitute custodian obtained a Writ of Execution for $23,700 from this Court. The law firm filed a Notice of Appeal on October 16, and has since

sought to stay execution and post a supersedeas bond pending appeal.

II. ANALYSIS AND DISPOSITION

At present, the substitute custodian, who was appointed by the Court, has not been paid and remains responsible for the vessel. Claimant remains entirely without use of his vessel. Mr. Coon testified at the hearing of October 25 that the vessel is in serious disrepair and in danger of sinking. Shutts & Bowen has been held liable for the costs necessitated by the action it prosecuted. It is clear that this litigation has brought only hardship to all parties involved. In ordering the termination of this action, the Court has attempted to achieve the most equitable result under the circumstances for all parties. Upon reconsideration of the record and hearing arguments of the parties on October 25, 1991, the interests of justice compel this Court to clarify its Order of August 23, 1991. The rights and liabilities of each of the parties

will be considered in seriatim.

A. Shutts & Bowen

Shutts & Bowen has objected vigorously to the imposition of litigation costs upon the firm. In its Motion for Partial Relief, the firm argued that because all of its actions were taken as agent for a disclosed principal, Plaintiff William Cosselmon, no liability could attach to the firm under the substitute custodian contract. Furthermore, the firm points to the Affidavit of Substitute Custodian of February 1, 1991, whereby Mr. Roscoe Coon acknowledged that, "[a]ll costs and expenses incidental to the keeping of the vessel will be paid by WILLIAM COSSELMON as the moving party." Aff. at ¶5. Counsel for Shutts & Bowen state in affidavits that they did not "expressly or implicitly promise in any way to pay the fees or costs of the substitute custodian appointed in this matter." Apps. G & H to Mot. for Part. Rel. They argue that the extent of the firm's

involvement in contracting for the substitute custodian's services was the drafting and "faxing" of the relevant documents.

Were the firm's liability predicated on the custodia legis contract, this argument would be dispositive. It is an obvious proposition of agency law that an attorney is not liable for the debts of his client solely because the attorney assisted in the transaction that gave rise to the debt. It is equally obvious, however, that an attorney is more than a mere agent when he brings and prosecutes an action on behalf of a client. As an officer of the court, an attorney's obligation extends beyond advocacy of his own client's interests. This obligation is especially important when such advocacy necessarily impacts upon "innocent" parties who are drawn into a particular suit.

Thus, it is improper for an attorney to continue a suit where it is clear either that there is no possibility of success on the

merits, see Fed. R. Civ. P. 11, or there is excessive and unreasonable cost to other litigants, see 28 U.S.C. §1927 (Supp. 1991). In either case, an attorney may be held personally liable for his actions in maintaining the suit. Congress has codified in part the inherent power of the court to assess fees and costs in certain circumstances by enacting 28 U.S.C. §1927, which provides:

Counsel's liability for excess costs

> Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

Under this statute, subjective "bad faith" on the part of an attorney is not a prerequisite to liability; a court is authorized to assess costs against an attorney "for 'unreasonable

and vexatious' multiplication of litigation despite the absence of any conscious impropriety." Jones v. Continental Corp., 789 F.2d 1225 (6th Cir. 1986).

In this case, counsel knew that an inevitable and fixed cost of maintaining this action was the substitute custodian's per diem fee of $100.00. Plaintiff's counsel also knew that the vessel arrested in this in rem action was nearly worthless. Counsel attached the Sales Contract to the Verified Complaint filed January 31, 1991, evidencing a purchase price paid by Claimant d'Albissin of $1,000.00. Claimant later introduced evidence to suggest that the Coco Loco, including its equipment and gear, was worth $9,000.00.[1] At most, then, the res here could support custodial fees of approximately three months.

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[1] On January 13, 1991, Claimant d'Albissin paid an additional $8,000.00 for other equipment and gear remaining on the vessel, such as engines, a generator, and fuel supply machinery. Exh. 10 to Cl. Mot. to Dism.

Nonetheless, on March 18, 1991 counsel filed a motion opposing a prescient attempt by Claimant to increase the security for costs to $8,000.00. Counsel argued in an accompanying memorandum of law that d'Albissin paid only $1,000.00 for the vessel, and thus "has demonstrated absolutely no need for protection up to and including [$8,000.00]." D.E. 19. Shutts & Bowen apparently, then considered the Coco Loco to be worth substantially less than $8,000.00. Counsel was undeniably aware that (1) Plaintiff had posted a cost bond that would not cover even one week of custodial fees and, more importantly, (2) the res arrested, even if the lien were ultimately foreclosed, could not support the rapidly mounting substitute custodian's fees. If there were any doubts as to the value of the Coco Loco, they must have been dispelled by the photographs of the "vessel" attached as exhibit 9 to Claimant's Motion to Dismiss of

June 4, 1991. These pictures depict a thoroughly burned-out hulk, charred and covered in debris. One need not be a maritime appraiser nor mathematician to appreciate the import of these facts.

Under these circumstances, it is questionable whether this in rem action should ever have been brought. There is no doubt, however, that the case should have been dismissed long ago. A reasonable juncture to consider dismissing the suit was Plaintiff's death, on April 28, 1991. At that time, accumulated custodial fees totalled $8,700.00 -- the approximate value of the Coco Loco. On May 3, 1991 Claimant wrote to Shutts & Bowen to ask for increased security in light of Plaintiff's death:

> The deposition of the substitute custodian Roscoe Coon evidenced some serious problems in the custodian legis disposition of this action; I insist that you don't delay correcting the lack of insurance and the

> lack of deposit for costs of custodian legis in order to legally guarantee the safekeeping of my property in the interim.
>
> I warn you again that in the circumstances of this case, you might be found liable for the costs that should have supported your action from the time you should have in good conscience withdrew from the case.

Exh. D to Pl. Mot. for Cont. of May 13, 1991.

Instead of dismissing the suit,[2] Shutts & Bowen moved to continue a hearing set for May 16, 1991, representing to this Court: "[a] Motion for Substitution shall be filed as soon as the proper documentation demonstrating the

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[2] Fed R. Civ. P. 25 (a) allows a motion for substitution of party within ninety (90) days after the death of a litigant is suggested upon the record. This rule, however, does not impact in any way upon the independent obligation of an attorney to avoid the imposition of excessive costs on other parties. As long as costs continue to accumulate, the mandate of 28 U.S.C. §1927 is not "stayed" or otherwise diminished by a party's death under rule 25.

proper substituted party becomes available." Id. at ¶14. On July 18, Shutts & Bowen moved for an extension of time to respond to Claimant's Motion to Dismiss. On July 25, Shutts & Bowen moved to continue the same hearing again, a motion that was denied by Judge Palermo on July 27. Finally, after Judge Palermo ordered "Plaintiff" to file a motion "delineating the status of the bond issued for security of the vessel," Shutts & Bowen moved for a voluntary dismissal on July 9, 1991. By Order dated July 24, this Court conditioned dismissal on payment of the custodian's fees. After the conditions for granting this motion remained unsatisfied, this Court entered a Final Order of Dismissal on August 23, imposing custodial fees on the law firm unless Plaintiff paid them.

The Court finds that the firm of Shutts & Bowen unreasonably and vexatiously multiplied the proceedings here within the meaning of 28 U.S.C. §1927, from the time of Plaintiff's

death until the time this Court entered its Order that finally disposed of the matter on August 23, 1991. By not seeking an immediate dismissal and prompt discharge of the substitute custodian after Plaintiff's death, the costs -- already high -- were allowed to accumulate to their present high levels. Shutts & Bowen failed to take any action to abate these inevitable costs during this period. Because the Final Order of August 23 should have been the final disposition of this matter, Shutts & Bowen will not be liable for costs accrued after that date.

Therefore, Shutts & Bowen has become liable for the costs of this litigation from April 29, the day after Plaintiff died, until August 23, a period of 117 days. At $100.00 per day,[3] these costs amount to $11,700.00.

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[3] In Shutts & Bowen's Emergency Application for Stay of Execution filed on October 17, 1991, the firm states that there was a "secret agreement between the substitute custodian and the plaintiff that the custodian would only be paid $30.00 per day for

B. Substitute Custodian

On the basis of the foregoing analysis, Shutts & Bowen is liable to Mr. Roscoe Coon of Marine Diesel Repair for $11,700.00. Mr. Coon, however, has no contractual claim against the law firm, and must look to the Plaintiff/obligor for payment of the remaining sum due under the substitute custodian contract. Mr. Coon is not by any means therby bereft of a remedy.

At a hearing held on October 25, 1991, Mr. Coon testified that he was retained as substitute custodian pursuant to a verbal agreement with Mr. Tom Cosselmon, Plaintiff Willaim Cosselmon's father. It is unclear

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performing custodial duties." Shutts & Bowen reiterated this contention during the hearing of October 25.

Shutts & Bowen attempts to quote the deceased plaintiff for the truth, on the basis of surviving relatives' out of court statements, in order to vary the terms of a writing, drawn by Shutts & Bowen, evidencing a contract for $100 per day. The evidentiary difficulties with Shutts & Bowen's submissions are obvious. The Court will not consider these allegations.

whether the senior Cosselmon made any personal promises to reimburse Mr. Coon, or merely acted as an agent for a disclosed principal. It is possible that Mr. Coon has a cause of action against Mr. Cosselmon on this contract. Plaintiff William Cosselmon's liability for the unpaid substitute custodian's fees is certain. See Donald D. Forsht Associates, Inc. v. Transamerica ICS, Inc., 821 F.2d 1556 (11th Cir. 1987) (holding that substitute custodian has action on contract with plaintiff/lienor where funds from sale of vessel did not cover custodian's costs), reh'g denied, en banc, 829 F.2d 1132. As noted above, Mr. Coon promised to perform custodial services by way of his "Affidavit of Substitute Custodian," and recognized that his fee would be paid by William Cosselmon. It is apparent from this document that there was a valid and binding contract between Plaintiff and Mr. Coon. Recovery for services under the

contract may be had from the estate of the Plaintiff.[4]

The substitue custodian is discharged from all responsibilities of his appointment as of the date of this Order.

C. Claimant d'Albissin

Claimant d'Albissin is entitled to immediate and unconditional possession of the vessel. This action has apparently resulted in substantial hardship for him, as he intended to salvage the Coco Loco for use as a home for his family and a source of rental income. Moreover, since d'Albissin purchased the vessel after the fire but before the Claim of Lien was filed, he was a complete stranger

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[4] Indeed, substitute custodian has filed a Petition for Administration in the Circuit Court of the Sixteenth Judicial Circuit In and For Monroe County, Florida, No. 91-239-CP-10. It appears that Plaintiff died while still possessed of the Windover, the vessel allegedly damaged by the fire on board the Coco Loco. It is thus possible that some or all of the substitute custodian's fees may be satisfied by the assets of the estate.

to the underlying tort that created the maritime lien in the first place. Claimant has deligently pursued the recovery of the Coco Loco from soon after the vessel was arrested.

The substitute custodian must surrender possession of the Coco Loco to claimant d'Albissin. No enforceable liens have attached to the vessel during the period she was in custodia legis. The Eleventh Circuit has held:

> Claims arising out of the care and operation of the vessel while it is in the custody of the court are not actually considered liens, as no lien can attach to a vessel while she is in judicial custody.

Donald D. Forsht, 821 F.2d at 1561; see also Payne v. SS Tropic Breeze, 423 F.2d 236 (1st Cir. 1970), cert. denied, 400 U.S. 964; The Commack, 8 F.2d 151, 152 (S.D. Fla. 1925) ("There can be no doubt that services and supplies furnished the vessel . . . after the

seizure of the vessel are not maritime liens."). Custodian's fees are an "expense of justice" arising from the administration of the vessel while within the court's jurisdiction. New York Dock Co. v. Steamship Poznan, 274 U.S. 117,121 (1927); D.D. Forsht, 821 F.2d at 1561; Pyne v. Oil Screw Fishing Vessel Chrisway, 298 F. Supp. 1160 (S.D. Ga. 1969). Therefore, the Court has equitable discretion to determine the priority and method of fee payment. See Steamship Poznan, 274 U.S. at 121-22.

The Court here concludes that "equity and good conscience," id. at 122, compel the return of the Coco Loco to Claimant d'Albissin free and clear of any encumbrances. The substitute custodian must look to Plaintiff for those costs that have not been taxed to Plaintiff's counsel. Neither the substitute custodian nor any of his subcontractors shall have recourse against the vessel or Claimant d'Albissin personally.

D. OTHER CLAIMS

Mr. R.E. Reckwerdt, operator of Robbies Safe Harbor Marine, Inc. has petitioned the Court for payment of $1,735.00 for dockage and electric service provided to tne Coco Loco. D.E. 66 (Mot. to Ord. Paym. of Sept. 23, 1991). Mr. Reckwerdt testified to these charges at the hearing of October 25. On the basis of the foregoing analysis, these claims do not give rise to any right to possession of the vessel. Mr. Reckwerdt must collect these costs from the one who initially contracted for the provision of the marina's services.

The Court will order the cost bond posted by Plaintiff and placed in the registry to be distributed to Robbies Safe Harbor Marina in partial satisfaction of such costs.

Accordingly, after careful consideration of this matter and the court being otherwise fully apprised, it is

ORDERED and ADJUDGED that Shutts & Bowen has become liable for 117 days of substitute

custodian's fees, at a rate of $100.00 per day. The firm of Shutts & Bowen shall thus pay $11,700.00 to Marine Diesel Repair. It is further

ORDERED and ADJUDGED that execution on such judgement against Shutts & Bowen is hereby STAYED during the pendency of the appeal. Pursuant to Fed. R. Civ. P 62 (d), the stay is contingent upon the posting of a supersedeas bond in the amount of $100.00. On the basis of Shutts & Bowen's fine reputation and respect in the community, the Court finds that such amount is sufficient to protect the interests of the parties. It is further

ORDERED and ADJUDGED that the substitute custodian, Marine Diesel Repair, is hereby DISCHARGED from all further responsibility under this Court's Appointment. It is further

ORDERED and ADJUDGED that the Cost Bond placed in the Registry of this Court on January 31, 1991 in the amount of $500.00 shall be RELEASED, with interest, in partial

satisfaction of services rendered to the vessel Coco Loco by Mr. R.E. Reckwerdt d/b/a Robbies Marine Safe Harbor Marine, Inc.

DONE and ORDERED in chambers at the United States District Courthouse, Federal Courthouse Square, Miami, Florida, this 30th day of October, 1991.

FILED
JAN 17 1994
OFFICE OF THE CLERK

No. 93-1031

(2)

In The

Supreme Court of the United States

October Term, 1993

ROSCOE COON AND ARNAUD GIRARD D'ALBISSIN,

Petitioners,

vs.

SHUTTS & BOWEN,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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STATEMENT OF ISSUES PRESENTED

Whether the Court should entertain a petition for certiorari filed by a *pro se* party without an interest in the outcome, where the legal issue raised does not represent a true conflict among the circuits, but simply a finding by the Eleventh Circuit that under the particular facts and circumstances of the case, there was no evidence of any bad faith, however defined, sufficient to support the imposition of monetary sanctions under 28 U.S.C. § 1927.

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STATEMENT OF JURISDICTION

There is no decisional conflict and no special and important reason for the exercise of the Court's jurisdiction. Petitioner, Arnaud Girard d'Albissin, an individual proceeding *pro se*, lacks standing to petition for certiorari in that he has no interest in the outcome of the petition, and cannot represent the interest of any other party. Roscoe Coon, doing business as Marine Diesel Repair, has not joined in the petition either personally or through counsel, and may not now join, pursuant to Rule 12.2, Supreme Court Rules.

STATEMENT OF THE CASE

Petitioner, Arnaud Girard d'Albissin, is the owner of the vessel COCO LOCO. He bought the boat after a fire on board the COCO LOCO had damaged another boat belonging to the plaintiff below, William Cosselmon.

William Cosselmon, represented by the law firm of Shutts & Bowen, commenced an action *in rem* for the damages to his vessel by arresting the COCO LOCO on February 4, 1991. Roscoe Coon, doing business as Marine Diesel Service, was appointed substitute custodian at a fee of $100 per day. He is not a proper party to the petition herein.

In late February, 1991, d'Albissin filed, *inter alia*, a motion to increase security, which was opposed by plaintiff because of insufficient proof of the value of d'Albissin's claimed interest. Cosselmon died in an automobile accident in South America on April 28, 1991. D'Albissin

did not introduce evidence of the value of his interest in the COCO LOCO until June 4, 1991. On July 1, 1991, his motion to increase security was deferred, requiring him to provide additional information. On July 9, 1991, upon being advised that its client's successor did not wish to continue the litigation, Shutts & Bowen moved for a voluntary dismissal, seeking return of the COCO LOCO to d'Albissin.

On July 17, 1991, the substitute custodian, Roscoe Coon, through counsel, moved for payment of custodial fees. On August 23, 1991 the district court entered a final order of dismissal, ordering the plaintiff to pay the accrued custodial fees, and, if plaintiff did not pay within seven days, ordering plaintiff's counsel, Shutts & Bowen, to make the payment. The order also provided that the COCO LOCO be returned to d'Albissin immediately upon payment of the fees.

On October 30, 1991, the district court issued an order of clarification, again imposing payment of the custodial fees, this time as a sanction against plaintiff's counsel, Shutts & Bowen, under 28 U.S.C. § 1927, for not having dismissed the action on the date of plaintiff's death. The COCO LOCO was returned to d'Albissin "free and clear of any encumbrances." Petitioner d'Albissin was thus not liable for payment of the custodial fees, and had no further interest in the proceedings.

Shutts & Bowen appealed the district court's imposition of the custodial fees, and the Eleventh Circuit, *per curiam*, vacated the district court's judgment, finding that the lower court had abused its discretion in the absence of any evidence that Shutts & Bowen unreasonably and

vexatiously delayed filing of the motion for dismissal or unreasonably and vexatiously multiplied the proceedings.

SUMMARY OF ARGUMENT

Petitioner has no interest in the issue raised, and therefore lacks standing, since he is not liable for payment of the custodial fees in any event. Only the custodian, Roscoe Coon, is affected by the appellate court's reversal of the fee award, and he has not timely pursued the issue in this Court, and cannot be represented by petitioner *pro se*.

There is no real conflict in the circuits' interpretation of "unreasonable and vexatious" under § 1927. The Eleventh Circuit's holding that sanctions may not be imposed under the facts of this case is in accord with other United States courts of appeal and should not be disturbed.

ARGUMENT

This is a case in which not even the petitioner has any interest in the outcome, and no substantial or important issue is raised. Certiorari should therefore be denied. The district court made an award of custodial fees against the deceased plaintiff's counsel, for not having sought dismissal of the action immediately upon plaintiff's death. Petitioner d'Albissin was not the recipient of the award, and was not liable for payment of the custodial fees upon reversal of the award.

Although the substitute custodian's name appears on the cover of petitioner's brief, the petition for certiorari was filed only by d'Albissin, *pro se*. Roscoe Coon did not file any separate petition within 90 days from entry of the order of the Eleventh Circuit sought to be reviewed, as required by Rule 13.1. Respondent subsequently received a certificate of service dated December 17, 1993, and apparently signed by Roscoe Coon. Even if such a paper were to be considered a joinder in d'Albissin's petition, it is untimely under Rule 12.2.

Petitioner invokes the Court's jurisdiction under Rule 10.1(a) by contending that the decision of the Eleventh Circuit Court of Appeals in this case conflicts with the decisions of other United States courts of appeal on the same matter. This is a false conflict. The holding of the Eleventh Circuit was based on its finding that the facts and circumstances of this particular case did not support the district court's imposition of the custodial fees as a sanction against the law firm under 28 U.S.C. § 1927. Therefore, "in the absence of bad faith intent to delay" the action, the district court abused its discretion, and the award was reversed.

This holding does not apply an improper standard of bad faith, as petitioner contends, but simply finds no evidence of bad faith, whether subjective or objective. The Eleventh Circuit standard is entirely in accord with the standard applicable in other United States courts of appeal, and requires more than the simple delay in dismissal found here. There must be an intent to delay or a willful disregard for proper conduct. *Avirgan v. Hull*, 932 F.2d 1572, 1582 (11th Cir. 1991), *cert. denied*, ___ U.S. ___,

112 S. Ct. 913 (1992) (excess costs assessed against attorneys "who willfully abuse judicial process by conduct tantamount to bad faith").

The challenged ruling is very much like the holding of the Ninth Circuit Court of Appeals in *MGIC Indemnity Corp. v. Moore*, 952 F.2d 1120 (9th Cir. 1991), in which the appellate court reversed the district court's imposition of § 1927 sanctions as an abuse of discretion. The sanctions had been imposed for the law firm's failure to drop the action as to one of the defendants prior to trial, but the district court made no explicit finding of bad faith. Seeing "no evidence of bad faith upon which the district court could have rationally based its decision," the Ninth Circuit reversed and stated the proper standard:

> Section 1927 . . . provides sanctions for unreasonably and vexatiously multiplying proceedings and requires a finding of bad faith. . . . We assess an attorney's bad faith under a subjective standard. Knowing or reckless conduct meets this standard.

962 F.2d at 1122. This is the same standard that was applied here.

In the Tenth Circuit a similar standard is set out in *Braley v. Campbell*, 832 F.2d 1504, 1512 (10th Cir. 1987) (§ 1927 sanction imposed "for conduct which manifests intentional or reckless disregard of the attorney's duties to the court"). The Sixth and Seventh Circuits are also in accord with the Eleventh Circuit standard. *In re TCI Ltd.*, 769 F.2d 441, 445 (7th Cir. 1985) (sanctions for "a lawyer's reckless indifference to the law"); *Kiefel v. Las Vegas Hacienda, Inc.*, 404 F.2d 1163, 1167 (7th Cir. 1968), *cert. denied*,

395 U.S. 908 (1969) (sanctions only for "serious and studied disregard for the orderly processes of justice."); *United States v. Ross*, 535 F.2d 346, 349 (6th Cir. 1976) ("intentional departure from proper conduct, or, at a minimum, a reckless disregard of the duty owed by counsel to the court"). The Third Circuit also requires "actions taken which are tantamount to willful bad faith" for imposition of § 1927 sanctions. *Baker Industries v. Cerberus Ltd.*, 764 F.2d 204, 209 (3rd Cir. 1985).

The 1980 amendment of § 1927 did not affect the applicable standard, but merely specified that any sanction imposed may include costs, expenses and attorneys fees. Revision Notes, § 1927. This Court found in *Chambers v. NASCO, Inc.*, ___ U.S.___, 111 S. Ct. 2123, 2134 (1991), that the court's inherent power to assess fees for bad faith misconduct was not affected by the amendment of § 1927. There is no need for this Court to again take up this issue.

In the present case the district court imposed sanctions under § 1927 only because "Shutts & Bowen failed to take any action to abate these inevitable [custodial] costs" after plaintiff's untimely death. October 30, 1991 order. While finding no subjective bad faith or any conscious impropriety, the district court likewise failed to find any reckless disregard for the law or of counsel's duties to the court, and thus no objective bad faith either. Where the acts complained of do not support the district court's imposition of sanctions, the Eleventh Circuit properly found that the district court had abused its discretion and reversed. In doing so the appellate court acted in accord with the standards used by other United

States courts of appeal and of this Court. There is therefore no reason for this Court to exercise its jurisdiction in this matter.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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